IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FILED

APR -3 2012

CLERK, U.S. DISTRICT COURT
RICHMOND, VA
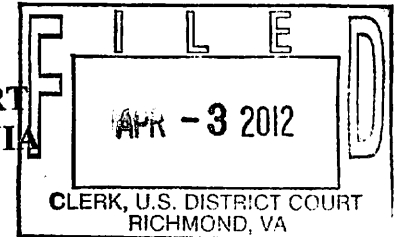
UNITED STATES OF AMERICA,   )
)
v.   )   Criminal Action No. 3:08CR107–HEH
)   Civil Action No._____
LORENZO OWEN SPELLMAN,   )
)
       Petitioner.   )

MEMORANDUM OPINION
(Dismissing Successive 28 U.S.C. § 2255 Motion)

By Memorandum Opinion and Order entered on June 13, 2011, the Court dismissed a 28 U.S.C. § 2255 motion filed by Petitioner. On January 25, 2012, the Court received a Motion to Correct Sentence wherein Spellman invokes Federal Rule of Civil Procedure 60(b).

The Antiterrorism and Effective Death Penalty Act of 1996 restricted the jurisdiction of the district courts to hear second or successive applications for federal habeas corpus relief by prisoners attacking the validity of their convictions and sentences by establishing a "gatekeeping mechanism." *Felker v. Turpin*, 518 U.S. 651, 657 (1996) (internal quotation marks omitted). Specifically, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

The United States Court of Appeals for the Fourth Circuit has held that inmates may not avoid the bar on successive collateral attacks on their convictions and sentences

by inventive labeling. *See United States v. Winestock*, 340 F.3d 200, 206 (4th Cir. 2003).

The Fourth Circuit has held "that district courts *must* treat Rule 60(b) motions as

successive collateral review applications when failing to do so would allow the applicant

to 'evade the bar against relitigation of claims presented in a prior application or the bar

against litigation of claims not presented in a prior application.'" *Id.* (quoting *Calderon*

v. Thompson, 523 U.S. 538, 553 (1998)). The Fourth Circuit provided the following

guidance in distinguishing between a proper Fed. R. Civ. P. 60(b) motion or an improper

successive § 2255 motion:

> [A] motion directly attacking the prisoner's conviction or sentence will
> usually amount to a successive application, while a motion seeking a
> remedy for some defect in the collateral review process will generally be
> deemed a proper motion to reconsider. Thus, a brand-new, free-standing
> allegation of constitutional error in the underlying criminal judgment will
> virtually always implicate the rules governing successive applications.
> Similarly, new legal arguments or proffers of additional evidence will
> usually signify that the prisoner is not seeking relief available under Rule
> 60(b) but is instead continuing his collateral attack on his conviction or
> sentence.

Id. at 207 (internal citation omitted).

Petitioner does not raise procedural defects in this Court's § 2255 review process.

Rather, Petitioner continues to challenge his underlying sentence. Therefore, Petitioner's

Rule 60(b) Motion (Dk. No. 37) must be treated as a successive § 2255 motion. *See id.*

Because the Court has not received authorization from the Fourth Circuit to file the

motion, the action will be dismissed for want of jurisdiction.

An appeal may not be taken from the final order in a § 2255 proceeding unless a

judge issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(B). A COA

will not issue unless a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Because Petitioner fails to satisfy this standard, a certificate of appealability will be denied.

An appropriate Final Order will accompany this Memorandum Opinion.

_____/s/_____

HENRY E. HUDSON
UNITED STATES DISTRICT JUDGE

Date: April 3 2012
Richmond, Virginia

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